CROWELL & MORING LLP
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2595
(202) 624-2500
FACSIMILE (202) 628-5116

SUITE 1200
2010 MAIN STREET
IRVINE, CALIFORNIA 92614
(714) 263-8400
FACSIMILE (714) 263-8414

180 FLEET STREET
LONDON EC4A 2HD
44-171-413-0011
FACSIMILE 44-171-413-0333

JOHN T. SCOTT, III
(202) 624-2582

August 26, 1996

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 95-116: Telephone Number Portability

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of Bell Atlantic NYNEX Mobile, Inc., are an original and eleven copies of its "Petition for Reconsideration" of the Commission's First Report and Order in the above-captioned proceeding.

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	CC Docket No. 95-116
Telephone Number Portability	)	

PETITION FOR RECONSIDERATION

BELL ATLANTIC NYNEX MOBILE, INC.

John T. Scott, III
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

Its Attorneys

Dated: August 26, 1996

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PETITION FOR RECONSIDERATION

Bell Atlantic NYNEX Mobile (BANM), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby seeks reconsideration of the Commission's First Report and Order in this proceeding (Order),[1] to the extent it imposes number portability obligations on commercial mobile radio service (CMRS) providers.

SUMMARY

The Commission's action turns both Congressional and Commission policy toward CMRS on their heads. It also conflicts with the rulemaking record, which showed that there was no present need for, nor competitive benefits from, wireless number portability, and that portability is not technically feasible at this time. The new rules impose a stricter deadline for compliance on CMRS providers than

[1]First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, FCC 96-286 (released July 2, 1996). Public Notice of the First Report and Order occurred on July 25, 1996. 61 Fed. Reg. 38605. This petition is therefore timely under Section 1.429.

on landline providers. And, the Commission did not preempt state efforts to impose number portability obligations on CMRS providers.

In these four respects, the Commission erred. The better course would have been to implement landline portability -- which is the only type of portability that the 1996 Telecommunications Act mandates -- and defer wireless portability until the Commission can make more informed judgments about the need for imposing its costs and burdens on CMRS providers large and small. BANM respectfully urges the Commission to do just that.

I. THE ORDER CONFLICTS WITH CONGRESSIONAL AND COMMISSION POLICY TOWARD CMRS.

The Commission's imposition of CMRS number portability requirements violates both Congressional and Commission policies to deregulate the provision of mobile telecommunications services. In 1993, Congress amended Section 332(c) of the Communications Act to adopt a more consistent and deregulatory approach to the regulation of CMRS which emphasizes market competition over government regulation. In numerous proceedings to implement Section 332(c), the FCC has consistently articulated a policy favoring deregulation of CMRS providers. As the Commission has declared, "We establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees that are classified as CMRS providers."[2]

[2] Implementation of Section 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411, 1418 (1994).

The Commission's adoption of number portability requirements for CMRS, however, marks a fundamental departure from this deregulatory policy. Instead of reducing regulatory burdens on CMRS, it has decided to impose, without the requisite record basis, a substantial new burden. The Commission was legally obligated to explain and justify its significant change in course. It did not do so. The Order fails to demonstrate why its new rules are consistent with Congress's determination that the CMRS industry should develop through market forces rather than by government fiat.

This failure is particularly serious given that the Telecommunications Act of 1996 provides no basis for imposing number portability obligations on CMRS providers. Section 251(b)(2) requires local exchange carriers to provide number portability to all telecommunications carriers. But the statute explicitly excludes commercial mobile service providers from the definition of local exchange carrier, and thus (as the Order acknowledges) from the obligation to provide number portability under that section. Congress's approach of deliberately distinguishing between the obligations of LECs and other carriers, including CMRS, created a high standard for the Commission to overcome before it could in the face of Section 251(b)(2) impose number portability on the CMRS industry. The Order fails to meet that standard. It also fails to reconcile the imposition of CMRS number portability rules with its recognition that the 1996 Act establishes "a pro-

competitive, deregulatory national policy framework" that is intended to "promote competition and reduce regulation."[3]

Because the 1996 Act does not require number portability for CMRS, the Commission is obligated to analyze the imposition of additional regulations within the policy framework developed for CMRS. As BANM previously pointed out, the Commission has determined that it will only impose new regulations on providers of CMRS where there is a "clear cut need" for doing so. The Order, however, rejects application of the "clear cut need" standard because it claims that this standard was announced in a proceeding to review state petitions to continue regulation of CMRS rates, and that "that proceeding did not address the Commission's authority to require CMRS providers to provide number portability." Order at ¶154.

The Commission's response misses the point and misconstrues its own CMRS policy. As the Commission itself states, Congress's regulatory approach to CMRS in enacting Section 332 "delineates its preference for allowing this emerging [CMRS] market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need."[4] The "clear cut need" standard states the Commission's regulatory approach to CMRS, which is not limited to consideration of state petitions to regulate CMRS rates but has in

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[3] Order at ¶2 quoting S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996).

[4] Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers, Order, 10 FCC Rcd 7025, 7031 (1995) (emphasis added).

fact been followed in other proceedings. It is the proper standard in light of the 1993 and 1996 amendments to the Communications Act. It was not followed here.

II. CMRS NUMBER PORTABILITY RULES ARE NOT WARRANTED AND ARE UNSUPPORTED BY THE RECORD.

The Commission's decision to impose wireless number portability is unsupported by factual information in the record and therefore arbitrary and capricious. Its action hinges on the conclusion that "the inability of customers to keep their telephone numbers when switching carriers hinders the successful entrance of new service providers into the cellular, broadband PCS, and SMR markets." Order at ¶ 157. The Commission, however, cites no facts to support the conclusion that lack of number portability hinders the entrance of new CMRS service providers. In fact, as shown by the overwhelming success of the PCS auctions, competition is present and is steadily increasing in the CMRS industry. Moreover, there is no record information to show that the lack of number portability has in fact hindered CMRS competition.[5]

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[5] The Commission cites only to the comments of Nextel and Omnipoint for the proposition that lack of number portability hinders entry of new CMRS competitors. Order at ¶ 157. But these parties do not provide factual support for the proposition, and merely speculate that number portability may become a competitive issue in the future. Moreover, Nextel is by far the leading provider of SMR service, and Omnipoint is a holder of a pioneer's preference license and successful bidder for additional PCS licenses. Clearly, a lack of number portability has not hindered either commenter's entry into the CMRS market.

The rapid entry of APC, a PCS licensee, into the Washington-Baltimore region has been cited by the Commission as evidence of increased CMRS competition. There

The Commission justifies its decision to impose landline number portability on several studies in the record "that demonstrate the reluctance of both business and residential customers to switch carriers if they must change numbers." Order at ¶29. These studies, however, concerned landline service. Significantly, the Commission cites no similar studies to show customers are reluctant to switch CMRS providers because of lack of number portability.

The Commission discounts the facts that most wireless traffic originates with the subscriber, and that even where traffic is routed to the subscriber the subscriber is not using the mobile number in advertising its business. Instead, however, it speculates that over time the advertising value of a wireless number will increase. That speculation is not a legally sufficient basis to impose wireless portability at this time, particularly given that, as the Commission has found, the number of CMRS competitors will also increase with the addition of numerous PCS and other wireless providers. Moreover, as the Commission is aware, the churn rates of existing CMRS providers are high, showing that CMRS subscribers are able and willing to switch providers offering what they perceive to be better services and/or rates. The record fails to establish that lack of number portability has discouraged subscribers from switching carriers. Without any supporting facts, the Commission's mere belief that number portability may remove a

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is no evidence that APC has been slowed by the lack of number portability, and APC did not file comments in this proceeding. The Commission's belief that number portability rules are needed to remove barriers to CMRS entry is undermined by what the market is in fact accomplishing without such rules.

barrier to CMRS entry is a legally inadequate ground for its imposition of number portability obligations.

The Commission's rush to impose CMRS number portability is particularly arbitrary because it is premised on the availability of equipment that the Commission acknowledges has not been developed. Unlike wireline portability, there is no record evidence that wireless number portability is feasible. Again, the mere belief that it is likely to be developed in the future is not a sufficient basis for the new rules.

With respect to landline carriers, the Commission found that "the record indicates that at least one method of long-term number portability will be technically feasible by mid-1997." Order at ¶81. There is no comparable finding for CMRS. In fact, the Commission acknowledges:

> The technical requirements for broadband CMRS portability have been given comparatively little attention compared to those for wireline. . . . Initial state efforts have generally not address the issue; . . . Moreover, cellular, broadband PCS, and covered SMR providers face technical burdens unique to the provision of seamless roaming on their networks, and standards and protocols will have to be developed to overcome these difficulties. Id. at ¶164.

Despite this realization that technical development of CMRS number portability is far behind landline number portability, the Commission nevertheless determined to impose number portability requirements on CMRS.

The Commission's action is also contrary to Congress's direction that only "technically feasible" number portability requirements be imposed. Even where number portability is mandated, Section 251(b)(2) requires the Commission to

determine whether imposition of number portability is "technically feasible." The Commission has failed to make this threshold determination for CMRS number portability, and therefore has imposed rules on CMRS providers that are inconsistent with Congress's intent toward imposing number portability.

III. THE COMPLIANCE DEADLINE FOR CMRS PROVIDERS IS STRICTER THAN FOR LANDLINE CARRIERS.

The Order adopts new rules that impose a stricter number portability compliance deadline on CMRS providers than landline carriers. While new Section 52.3, 47 CFR § 52.3, requires LECs in the 100 largest MSAs to implement number portability by December 31, 1998, its does not require LECs in smaller MSAs to provide long-term number portability unless another telecommunications carrier specifically requests it. Even then, the LEC has six further months to comply. This means that, in large areas of the nation, landline number portability is not required to be in place until June 30, 1999 at the earliest, and will not be required at all if there is no competing landline provider to request it.

CMRS providers, however, do not have this flexibility. New Section 52.11 requires all cellular, broadband PCS, and covered SMR providers to provide number portability capability by June 30, 1999, regardless of whether a carrier so requests. No exception is made for CMRS providers serving smaller MSAs, RSAs or other areas outside the top-100 MSAs.

The Order supplies no basis for this disparate treatment of CMRS providers. The Commission supports its decision not to require landline number

portability for smaller MSAs by noting that the "actual pace of competitive entry into local markets should determine the need for service provider portability," and that "a six month interval is appropriate given the more significant network upgrades that may be necessary for carriers operating in these smaller area." Order at ¶82. This analysis should also apply to CMRS. There is no reason to impose burdensome number portability requirements on smaller market CMRS providers without a clear demonstration that the service is required, yet the requirements become mandatory on a date certain, even if no carrier is seeking to have them imposed. And, smaller CMRS systems are no less likely to be severely burdened by the number portability requirements.

The fixed deadline for all CMRS providers creates another equally serious problem in that the Commission assumes that the regional databases that CMRS providers need to access will all be in place. Yet the new rules do not impose any deadline for this to occur nationwide, and the Commission rejected the concept of a nationwide database. In addition, the Commission allowed states to develop their own statewide databases in lieu of those to be implemented by the North American Numbering Council. Order at ¶¶ 91-102. Even assuming that the inevitable issues which will arise as state and/or NANC databases are established can be resolved by 1999, there may be no database in place for some areas served by CMRS providers. And, given that many CMRS providers encompass areas that are not defined by MSAs, their service areas will in many cases not match the landline database regions.

These problems again counsel against imposing number portability rules on CMRS providers at this time. The Commission should focus on implementing landline number portability, and defer wireless portability until after landline implementation is complete. Should, however, the Commission decide to maintain CMRS number portability rules, it must correct these flaws in its implementation rules. No CMRS provider should be required to provide number portability until June 30, 1999, and then only (1) six months after it has received a request from a competing provider, and (2) after regional or statewide databases are in place for all of the areas covered by the CMRS provider.

IV. IF NUMBER PORTABILITY IS RETAINED, STATE REQUIREMENTS MUST BE PREEMPTED.

If the Commission retains its CMRS number portability rules, it should preempt state number portability requirements on CMRS carriers. While the language in the Order advances a number of reasons why national number portability rules are good policy, it does not specifically preempt state rules.

The record provides a strong basis for federal preemption of number portability issues. As the Commission notes, Section 251(b)(2) requires the Commission to prescribe number portability regulations for LECs. Section 251(e)(1) provides the Commission with exclusive jurisdiction over that portion of the NANP that pertains to the United States and gives the Commission authority over the implementation of number portability to the extent that such implementation will affect the NANP. Taken together, these statutory

requirements provide an ample basis for federal preemption of state efforts to impose number portability standards.

The case for federal preemption of CMRS number portability is equally compelling. The Commission recently preempted state regulation of CMRS emergency E911 systems, noting that "It is well established that this Commission may preempt state regulation when (1) the matter to be regulated has inseverable interstate and intrastate aspects; and (2) preemption is necessary to protect a valid Federal regulatory objective."[6] Both these conditions are met with respect to CMRS number portability.

First, as the Commission acknowledges, number portability has inseverable interstate aspects, and "ensuring the interoperability of networks is essential for deployment of a national number portability regime." Order at ¶37. Second, with the passage of the 1996 Act, number portability is unquestionably a valid Federal regulatory objective, and Section 251(e)(1) gives the Commission "exclusive" jurisdiction over numbering administration. As the Commission notes, "It is important that we adopt uniform national rules regarding number portability implementation and deployment to ensure efficient and consistent use of number portability methods and numbering resources on a nation wide basis." Order at 37. Third, preemption is especially important for CMRS because many systems span state lines and cannot accommodate multiple portability requirements. For

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[6] Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-102, ¶104 (released July 26, 1996).

these reasons the Commission must explicitly hold that state imposition of CMRS number portability standards is preempted.

CONCLUSION

For the reasons set forth above, BANM urges the Commission to set aside its imposition of number portability requirements on CMRS providers, and defer consideration of the need for separate rules requiring CMRS number portability until landline portability has been implemented.

Respectfully submitted,

BELL ATLANTIC NYNEX MOBILE, INC.

By: John T. Scott, III

John T. Scott, III
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Its Attorneys

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